

## Message Text

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FM SECSTATE WASHDC  
TO AMEMBASSY BONN PRIORITY  
INFO AMEMBASSY BERLIN  
AMEMBASSY PARIS  
AMEMBASSY LONDON

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E.O. 11652: N/A

TAGS: PFOR, EAIR, WB, GW, US, UK, FR

SUBJECT: PAN AM IGS CLAIM

1. DUE TO FRG AIR TRAFFIC CONTROL SLOWDOWN DURING LATTER  
HALF OF 1973, PAN AMERICAN SUFFERED LOSSES OF APPROXIMATELY  
5.5 MILLION DOLLARS ON IGS BERLIN SERVICES. PAN AM OVER-  
TURES CONCERNING ADMINISTRATIVE SETTLEMENT OF CLAIM HAVE  
TWICE BEEN REJECTED BY FEDERAL MINISTRY OF TRANSPORT, BY  
NAU IN APRIL 1974 AND FUCHS IN FEBRUARY 1975. TEXT SET  
FORTH BELOW HAS BEEN PREPARED FOR PRESENTATION AS AIDE-  
MEMOIRE TO FRG GOVERNMENT IN HOPE OF USING US GOOD OFFICES  
TO ACHIEVE SETTLEMENT AND AVOID LENGTHY LITIGATION.

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2. ECON MINISTER SHOULD PRESENT AIDE-MEMOIRE AT A HIGH  
LEVEL IN THE FOREIGN MINISTRY. PRESENTATION SHOULD STRESS  
POLITICAL CONSIDERATIONS IN FAVOR OF ADMINISTRATIVE SETTLE-  
MENT, SUCH AS PAN AM'S PRIMARY ROLE IN IGS SERVICES,  
RATHER THAN TREATY AND DOMESTIC LEGAL THEORIES SUPPORTING  
CLAIM.

3. PAN AM HAS VOLUNTEERED TO SUPPLY ADDITIONAL BACKGROUND INFORMATION TO ECON MINISTERS, THROUGH COMPANY'S GERMAN MANAGER C.W. RUNETTE AND INTERNATIONAL COUNSELOR NORMAN SEAGRAVE, THE LATTER PREPARED TO TRAVEL FROM NEW YORK TO BONN AT EMBASSY'S SUGGESTION.

4. FOLLOWING IS TEXT OF AIDE-MEMOIRE.

-- PAN AMERICAN WORLD AIRWAYS, INC. HAS SOUGHT THE GOOD OFFICES OF THE UNITED STATES GOVERNMENT IN SUPPORT OF A CLAIM IT HAS PRESENTED TO THE GOVERNMENT OF THE FEDERAL GERMAN REPUBLIC FOR DAMAGES SUFFERED IN CONNECTION WITH ITS SERVICES BETWEEN THE FEDERAL REPUBLIC AND BERLIN AS A RESULT OF THE INADEQUATE PROVISION OF AIR TRAFFIC CONTROL SERVICES IN THE TERRITORY OF THE FEDERAL REPUBLIC FOR A PERIOD OF SIX MONTHS IN 1973. A DESCRIPTION OF PAN AMERICAN'S LOSSES IS SUBMITTED AS AN ATTACHMENT. THIS MEMORANDUM SUMMARIZES THE CONSIDERATIONS WHICH HAVE LED THE U.S. GOVERNMENT TO CONCLUDE THAT PAN AMERICAN IS ENTITLED TO COMPENSATION.

-- THE BASIC FACTS ARE NOT IN DISPUTE. AIR TRAFFIC CONTROL PERSONNEL, EMPLOYEES OF THE FEDERAL GOVERNMENT, HAD BEEN SEEKING PAY INCREASES AND OTHER BENEFITS WHICH THE GOVERNMENT WAS NOT PREPARED TO GRANT. BEGINNING ON MAY 31, 1973, AND EXTENDING CONTINUOUSLY TO NOVEMBER 30 OF THAT YEAR, THE GREAT MAJORITY OF THE CONTROLLERS TOOK ACTIONS DESIGNED TO BRING PRESSURE ON THE GOVERNMENT TO ACCEDE TO THEIR DEMANDS. NO STRIKE WAS CALLED, THE ACTIONS CONSISTED OF LIMITED OFFICIAL USE

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ON-THE-JOB SLOWDOWNS AND ABSENCES WITH FEIGNED ILLNESSES (HEREIN COLLECTIVELY REFERRED TO AS THE "SLOWDOWN"). THE SLOWDOWN WAS HIGHLY EFFECTIVE, AND AS A DIRECT RESULT AIR TRANSPORT SERVICES TO, FROM, AND WITHIN GERMANY WERE SERIOUSLY DISORGANIZED AND THE AIRLINES AND OTHERS SUFFERED VERY EXTENSIVE ECONOMIC LOSSES.

-- SINCE AIRCRAFT CAN BE OPERATED ONLY UPON RECEIPT OF AIR TRAFFIC CONTROL CLEARANCES AND IN ACCORDANCE WITH THE INSTRUCTIONS OF ATC PERSONNEL, INJURED PARTIES COULD LOOK TO THE FEDERAL GOVERNMENT ALONE FOR A SOLUTION. THE FRG DID INSTITUTE LEGAL ACTION IN THE COURTS FOR INJUNCTIVE RELIEF AND DAMAGES AGAINST THE CONTROLLERS' UNION. ON NOVEMBER 16, 1973, THE 11TH CIVIL SENATE OF THE OBERLANDESGERICHT OF CELLE REINSTATED AN INJUNCTION WHICH HAD BEEN ISSUED AND THEN DISSOLVED BY A LOWER COURT. WHILE THIS CASE ESTABLISHED THE ILLEGALITY OF THE SLOWDOWN AS A MATTER OF LAW, IT FAILED TO AVOID SERIOUS DAMAGE TO PARTIES SUCH AS PAN AMERICAN OVER A PERIOD OF SIX FULL

MONTHS.

-- THE FEDERAL GOVERNMENT'S OBLIGATION TO ASSUME THE BURDEN OF THE LOSSES RESULTING FROM THE SLOWDOWN CONDUCTED BY ITS SERVANTS WAS QUICKLY ESTABLISHED. IN EARLY 1975, IN A DECISION INVOLVING THE DOMESTIC SCHEDULED AIRLINE, CIMBER AIR, TBE LANDGERICHT KIEL DECLARED THE SLOWDOWN TO BE UNLAWFUL AND CONCLUDED THAT THE GOVERNMENT OF THE FEDERAL REPUBLIC BORE THE RESPONSIBILITY FOR THE ACTIONS OF THE AIR TRAFFIC CONTROLLERS AND WAS OBLIGED TO COMPENSATE PLAINTIFF CIMBER AIR FOR LOSSES IT HAD INCURRED. IN A SUIT BROUGHT BY AN AIR TRAVEL AGENT, NECKERMANN, THE OBERLAND-ESGERICHT IN KOELN SIMILARLY DETERMINED THAT THE PLAINTIFF WAS ENTITLED TO RECOVER FROM THE FEDERAL REPUBLIC.

-- PAN AMERICAN HAS TWICE PRESENTED A CLAIM FOR COMPENSATION TO THE FEDERAL MINISTRY OF TRANSPORT, BUT HAS BEEN LIMITED OFFICIAL USE

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DENIED RECOVERY, ONCE ON THE BASIS THAT THE FRG OWED A DUTY ONLY TO THE GENERAL PUBLIC AND NOT TO THE AIRLINES, AND BOTH TIMES ON THE GROUND THAT RECIPROCITY REQUIRED BY THE 1910 STATUTE ON LIABILITY OF THE REICH FOR ITS CIVIL SERVANTS DOES NOT EXIST.

-- THE U.S. BELIEVES THERE ARE TWO INDEPENDENT BASES SUPPORTING COMPENSATION FOR PAN AMERICAN. PAN AMERICAN'S ROLE IN PROVIDING A MAJOR SHARE OF THE IMPORTANT CIVIL AIR CONNECTIONS BETWEEN BERLIN AND THE FRG PROVIDES AN IMPORTANT ADDED DIMENSION TO ITS CLAIM. UNDER WARTIME AND POSTWAR AGREEMENTS CONCLUDED AMONG THE FOUR POWERS, THE UNITED STATES SHARES WITH FRANCE AND GREAT BRITAIN RESPONSIBILITY FOR MAINTAINING AIR CONNECTIONS BETWEEN BERLIN AND THE FRG. OPERATING ON AUTHORIZATION FROM THE CIVIL AIR ATTACHES OF THE THREE POWERS, PAN AMERICAN, ALONG WITH BRITISH AIRWAYS AND AIR FRANCE, OPERATES THE VITAL CIVIL AVIATION COMPONENT OF THESE AIR CONNECTIONS. THE FACT THAT THE FEDERAL GOVERNMENT HAS SEEN FIT TO PROVIDE SUBSIDIES FOR THESE ALLIED AIR SERVICES DEMONSTRATES THEIR IMPORTANCE TO THE VIABILITY OF BERLIN.

-- THE NEED TO TAKE ALL NECESSARY STEPS TO MAINTAIN THESE IMPORTANT AIR SERVICES BETWEEN THE FRG AND BERLIN WAS RECOGNIZED IN THE BONN/PARIS CONVENTIONS OF 1952/54. IN PARTICULAR, CHAPTER TWELVE OF THE CONVENTION ON THE SETTLEMENT OF MATTERS ARISING OUT OF THE WAR AND THE OCCUPATION OBLIGATES THE FEDERAL REPUBLIC TO SUPPORT AIR TRAFFIC IN THE BERLIN AIR CORRIDORS. IN THE BONN/PARIS CONVENTIONS, THE PARTIES PLAINLY INTENDED THAT THE BERLIN AIR SERVICES WERE TO BE SAFEGUARDED BY THE FEDERAL

AUTHORITIES AGAINST THE POSSIBILITY OF INTERFERENCE OR  
DELAY. THE STANDARD OF RESPONSIBILITY UNDER THE TREATY  
FOR INSURING THE UNIMPEDED PASSAGE OF US FLAG AIRCRAFT TO  
AND FROM THE CORRIDORS COULD NOT BE LESS THAN THAT WHICH  
THE GERMAN COURTS HAVE FOUND TO BE OWED TO GERMAN NATIONALS  
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UNDER GENERAL GERMAN LAW.

-- A BASIS FOR LIABILITY TO PAN AMERICAN ARISES DIRECTLY  
FROM THOSE JUDICIAL DECISIONS WHICH HAVE NOW ESTABLISHED

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THAT THE FEDERAL REPUBLIC IS IN FACT LIABLE TO PRIVATE  
COMMERCIAL INTERESTS INJURED BY THE SLOWDOWN. THE VIEW  
OF THE MINISTRY OF TRANSPORT CONCERNING RECIPROCITY SEEMS  
UNFOUNDED IN LIGHT OF THE FACT THAT UNDER THE FEDERAL TORT  
CLAIMS ACT, 28 U.S.C. SECTIONS 2671-80, WHICH PROVIDES A  
CAUSE OF ACTION FOR PRIVATE INJURY CAUSED BY WRONGFUL ACTS  
OF THE UNITED STATES GOVERNMENT, GERMAN NATIONALS ENJOY  
ACCESS TO UNITED STATES COURTS ON AN EQUAL BASIS WITH  
UNITED STATES CITIZENS. IN VIEW OF THESE CONSIDERATIONS  
WE TRUST THAT THE REQUISITE DECLARATION OF RECIPROCITY  
COULD READILY BE ISSUED.

-- WHILE IT THEREFORE APPEARS THAT PAN AMERICAN HAS A CLAIM  
FOR RECOVERY OF ITS LOSSES THAT WOULD HAVE BEEN COGNIZABLE  
IN THE GERMAN COURTS HAD SUCH A DECLARATION BEEN ISSUED,  
THE UNITED STATES GOVERNMENT HOPES THAT THE GERMAN GOVERN-  
MENT WILL NOT EXPECT PAN AMERICAN TO ACCEPT ADDITIONAL  
BURDENS OF EXPENSE AND DELAY PURSUING THE MATTER THROUGH  
THE COURTS. PAN AMERICAN, WHICH WAS OPERATING THE BERLIN  
AIR SERVICES ON BEHALF OF THE UNITED STATES, HAS ALREADY  
SUFFERED SEVERE ECONOMIC LOSSES FROM THE SERIOUS AND PRO-  
TRACTED DISORGANIZATION OF THE BERLIN AIR SERVICES ARISING  
FROM THE SLOWDOWN WITHIN THE FEDERAL REPUBLIC OF GERMANY.  
IT WOULD APPEAR MORE REASONABLE, AND IN THE INTEREST OF  
GOOD RELATIONS BETWEEN OUR TWO COUNTRIES, FOR THE FRG TO  
EFFECT AN ADMINISTRATIVE SETTLEMENT. MOREOVER, SUCH  
ACTIONS BY THE FEDERAL GERMAN REPUBLIC WOULD APPEAR CON-  
SISTENT WITH THE RESPONSIBILITY ASSUMED BY IT UNDER THE  
BONN CONVENTIONS.

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-- THE UNITED STATES GOVERNMENT IS AWARE THAT THE GOVERN-

MENT OF THE FEDERAL GERMAN REPUBLIC HAS BEEN DEEPLY  
DISTRESSED BY THE CONSEQUENCES OF THE SLOWDOWN AND IN  
PARTICULAR BY ITS IMPACT ON THE INTEGRITY AND EFFICIENCY  
OF THE BERLIN SERVICES, TO WHICH BOTH GOVERNMENTS HAVE  
AMPLEY DEMONSTRATED THEIR TOTAL COMMITMENT AT CRITICAL  
PERIODS IN THE PAST. IN SUPPORTING COMPENSATION FOR PAN  
AMERICAN BY INFORMAL SETTLEMENT, THE UNITED STATES IS  
SUGGESTING THE COURSE IT BELIEVES BEST DESIGNED TO SECURE  
A PROMPT AND AMICABLE SOLUTION OF THIS DISPUTE.  
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## Message Attributes

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**Type:** TE  
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